

STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA

EMPLOYEE TRUST FUNDS BOARD, THE
DEPARTMENT OF EMPLOYEE TRUST FUNDS,
and ERIC O. STANCHFIELD, Secretary of the
Department of Employee Trust Funds,

Petitioners,

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC.,
JOHN CHAREWICZ, DAVID MAHONEY, SUSAN ARMAGOST,
and STEVEN URSO,

Proposed Intervening Petitioners,

v.

GEORGE LIGHTBOURN, Acting Secretary
of the Wisconsin Department of
Administration, JACK C. VOIGHT,
Wisconsin State Treasurer,

Respondents,

WISCONSIN EDUCATION ASSOCIATION
COUNCIL, by its President TERRY CRANEY
and its Vice-President, STAN JOHNSON, and
DONALD KRAHN, MARGARET GUERTLER,
GERALD MARTIN, and PHYLLIS POPE,

Intervening Respondents.

MEMORANDUM IN SUPPORT OF
WISCONSIN PROFESSIONAL POLICE ASSOCIATION'S
MOTION TO INTERVENE

1. INTRODUCTION

On December 23, 1999, Petitioners Employee Trust Funds Board (“ETF Board”), The Department of Employee Trust Funds (“DETF”) and Eric O. Stanchfield, Secretary of the DETF (“Stanchfield”), filed a Petition for a preliminary injunction and a Petition to commence an original action which includes a Complaint seeking a declaratory judgment as to the constitutionality and legality of certain provisions of a recently enacted state statute, 1999 AB495 (“AB495”). AB495 provides for certain changes to the Wisconsin Retirement System (“WRS”). In their Complaint, Petitioners assert that certain provisions in AB495 create unconstitutional takings of private property without just compensation, create unconstitutional impairments of contract, violate state statute, and provide for illegal usurpation of Executive power by the Legislature. Petitioners also pose the question but take no position on whether or not certain provisions, including one provision which affects these Proposed Intervenors (as protective occupation participants) but not most other WRS participants, violate the equal protection clauses of the United States and Wisconsin Constitutions. The Complaint seeks a declaration on the legality of certain provisions of AB495, severance of any unconstitutional provisions, and, by implication, implementation of any remaining provisions.

Respondents filed a response to the Petition for leave to file an original action in this Court agreeing that such leave should be granted. They also responded to the Petition for temporary injunction by agreeing to a temporary restraining order pending the Court’s decision on original action and briefing on the Petition for injunction, but otherwise opposing any such injunction.

The Wisconsin Education Association Counsel, by its President Terry Craney, Vice-President Stan Johnson, and Donald Krahn, Margaret Guertler, Gerald Martin, and Phyllis Pope ("WEAC"), has filed a motion to intervene as a Respondent, and that motion has been granted to a limited extent as discussed further, below.

On December 29, 1999, the Court issued a temporary injunction on the implementation and enforcement of AB495 and its companion statute AB584. The temporary injunction allows DETF to take appropriate measures in preparation of said implementation and enforcement. On December 29, 1999, the Court also placed in abeyance the petition for original action, and ordered Respondents to file a response to the proposed Complaint seeking a declaratory judgment. On January 12, 2000, the Court issued a further Order granting WEAC's motion to become an Intervening Respondent on a limited basis and ordering it to file a response to the Petitioner's proposed Complaint. That Order also set a January 31, 2000 deadline for WEAC's response and Respondent's response to the proposed Complaint. On January 12, 2000, the Court also ordered all three parties to file memoranda by January 31, 2000 addressing: 1) petitioner's standing to challenge the constitutionality of AB495, 2) the authority by which petitioners and respondents retained private counsel, and 3) whether the attorney general has been provided the requisite notice under Wis. Stat. §806.04(11).

Proposed Intervening Petitioner, the Wisconsin Professional Police Association, Inc. ("WPPA"), is a Wisconsin nonstock corporation that is a professional labor and fraternal association. The WPPA has more than 7,500 members virtually all of whom are active and retired employees of county and municipal governments in Wisconsin.

Virtually all of WPPA's members are working or retired law enforcement officers who are either active participants in the WRS or current annuitants of the WRS. Most of the WPPA's members meet the definition of "protective occupation participant" in WRS, pursuant to Wis. Stat. §40.02(48). As such, WPPA members have a vested and personal interest in the outcome of this litigation.

The individual Proposed Intervening Petitioners, John Charewicz, David Mahoney and Susan Armagost are employed as law enforcement officers and are current protective occupation participants in the WRS. The individual Proposed Intervening Petitioner, Steven Urso, is a retired deputy sheriff who is in the protective occupation participant category with the WRS and is a current annuitant with the WRS.

II. UNDER WIS. STAT. §803.09(1), WPPA MUST BE ALLOWED TO INTERVENE AS A MATTER OF RIGHT¹.

WPPA is entitled to intervene in the present action under Wis. Stat. §803.09(1), which provides that:

(1) Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

This Court has articulated the four requirements for intervention as of right based on the statute as follows:

1. For simplicity, the balance of this memorandum will refer to the Wisconsin Professional Police Association, Inc. and the individual proposed intervenors collectively as "the WPPA."

- (1) that the motion to intervene be made in a timely fashion;
- (2) that the movant claims an interest relating to the property or transaction which is the subject of the action;
- (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
- (4) that the movant's interest is not adequately represented by existing parties.

Armada Broadcasting, Inc. v. Stirn, 183 Wis. 2d 463, 471, 516 N.W.2d 357

(1994).

WPPA meets all four of these criteria and has a right to intervene in the present action.

A. WPPA's Motion Is Timely.

The question of timeliness is a matter of discretion. See *Armada Broadcasting*, 183 Wis. 2d at 471. The critical factor in considering timeliness is whether the proposed intervenor has acted promptly. *Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). A second factor is whether intervention will prejudice the original parties to the lawsuit. *Id.* In *Armada Broadcasting*, the proposed intervenor, Schauf, filed his motion to intervene the same day that oral arguments were to be held on the merits of the case (a writ for mandamus). *Armada Broadcasting*, 183 Wis. 2d at 469. The trial court did not cite timeliness as grounds to deny the motion to intervene, *id.* at 471-72, and the Wisconsin Supreme Court found that as "Schauf filed and argued his motion for

intervention prior to the commencement of the first hearing on the mandamus action Schauf's motion was timely." *Id.* at 472.

In the present matter, the Court has not yet ruled on whether it will take original jurisdiction in this case, thus it has not yet begun to consider the merits of the matter. The Respondents and Intervening Respondents have been ordered to file their responses to the Petitioner's proposed Complaint by January 31, 2000. WPPA's Motion to Intervene, this Memorandum in Support, and proposed Complaint have been filed prior to the day Respondent's and Intervening Respondent's responses are due. WPPA has acted promptly in filing this Motion and Memorandum, making its interest in this lawsuit known to the Court and the parties, and none of the present parties are prejudiced by the timing of WPPA's Motion.

B. WPPA Members Have An Ownership Interest In The Property Which Is The Subject Of This Action.

In determining whether a proposed intervenor claims an interest relating to the pending action, the Court must determine whether that intervenor's interest is "sufficiently related" to the action. See *Armada Broadcasting, Inc.*, 183 Wis. 2d at 472. This analysis must be performed pragmatically, with an eye to "involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.*

The Public Employee Trust Fund (“the Fund”) is the property which is the subject of this action. AB495 proposes to alter use of the Fund’s assets, and Petitioners and Proposed Intervening Petitioners challenge the legality of such changes. As participants and annuitants, WPPA members have vested rights to the assets of the Fund. See Wis. Stat. §40.19(1). These rights create for each participant and annuitant a property interest in their retirement system. See *Assn. of State Prosecutors v. Milwaukee Cty.*, 199 Wis. 2d 549, 558, 544 N.W.2d 888, 892 (1996); *Wisconsin Retired Teachers Assn., Inc., et al. v Employee Trust Funds Board, et al.*, 207 Wis. 2d 1, 18, 558 N.W.2d 83 (1997) (“WRS annuitants have a property interest in the WRS.”).

These rights of WRS annuitants and participants include the right to the proper use of investment earnings, such as the proper calculation and distribution of surplus investment earnings credited to the WRS annuity reserve account. See *Wisconsin Retired Teachers Assn.*, 207 Wis. 2d at 19. The rights of WPPA’s members also include proper use of the funds themselves. See *Assn. of State Prosecutors*, 199 Wis. 2d at 558.

WPPA members’ property interests are directly implicated in the subject of this lawsuit. Petitioners have identified portions of AB495 which may be unconstitutional and have obtained a temporary injunction preventing the entire law from going into effect until further order of this Court. Respondents have

agreed to the temporary injunction, but argue that all of AB495 will ultimately pass constitutional muster. WEAC opposes continuing a blanket injunction on implementation of AB495 and advocates for a more selective injunction pending this Court's decision on the merits. This Court is being asked to make multiple interim and final rulings relating to AB495, and any one, if not all, of those decisions may affect the property rights of WPPA members as participants and annuitants in the WRS.

WPPA members have real and significant interests that will be affected by the resolutions of the issues raised by this lawsuit. WPPA must be allowed to represent the interests of its members impacted by AB495, especially due to their unique position as protective occupation participants in WRS. It would be most efficient for the Court to hear and consider WPPA's arguments along with the other parties' so as to avoid further litigation, and to provide the Court with access to additional resources which may be useful in resolving the multiple and complex issues presented by this case.

C. Intervention By WPPA Is Necessary To Protect Its Members' Recognized Interest In The Property At Issue In This Suit.

A proposed intervenor must be allowed to intervene if "the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect" its interests. *Bilder*, 112 Wis. 2d at 545. A significant question

of Petitioner's standing has been raised, but not yet resolved. If that question is resolved against Petitioners, the Court will be forced to dismiss this suit unless an intervenor with a separate and independent basis for jurisdiction, such as the WPPA, has become an Intervening Petitioner. See *Fox v. Dep't of Health & Social Services*, 112 Wis. 2d 514, 536-37, 334 N.W.2d 532 (1983). Intervention by a party such as the WPPA as a Petitioner prior to that decision is crucial, so as to avoid the unnecessary delay and expense of a new suit based on the same grounds as have been raised by Petitioners here. See *id.* Even more significant, if this suit is dismissed for lack of a Petitioner with standing, the status quo which presently exists, which this Court has protected with the preliminary injunction issued on December 29, 1999, will be destroyed. A decision from this Court to dismiss this suit or to allow it to go forward without allowing the WPPA to intervene will prevent the WPPA from pursuing its members' claims in another court or another lawsuit. A final decision by this Court finding all or part of AB495 constitutional will foreclose any further litigation as to the constitutionality of those provisions with respect to the WPPA. Similarly, a final decision by this Court finding all or part of AB495 constitutional or dismissing the suit for Petitioner's lack of standing will result in speedy implementation of those provisions, and also foreclose any recourse by WPPA members. Furthermore, as Petitioners purport to represent the interests of all participants and annuitants, under the principle of *res judicata*,

whatever decision this Court makes could be deemed final as to the WPPA and its members who are WRS participants and annuitants. Even if a decision in this case without WPPA intervention were found not to preclude subsequent claims or issues raised by WPPA members, under the principle of *stare decisis*, in a later suit, the WPPA would have an especially difficult time persuading this Court to depart from the principles set forth in its earlier ruling (i.e., the ruling anticipated in the present case).

D. None Of The Parties Adequately Represent The Interests Of WPPA Members.

Among the factors to be considered in analyzing the fourth prong of the test of a movant's right to intervene are whether there is a showing of collusion between the existing parties, whether the parties' interests are adverse to that of the proposed intervenor, and whether the party who purports to represent the proposed intervenor fails in the fulfillment of that duty. See *Armada Broadcasting, Inc.*, 183 Wis. 2d at 476. The showing required for proving inadequate representation "should be treated as minimal." *Id.* (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

Neither the interests of Petitioners and WPPA members, nor the interests of Respondents and WPPA members, are the same². WPPA members have personal,

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tangible rights that will be affected by the Court's ruling, and those rights run counter to the rights of even other WRS participants and annuitants. This is particularly well illustrated by the differential treatment of protective occupation participants and other WRS participants in AB495. Petitioners have not taken a position as to whether that differential treatment violates the Equal Protection clauses of the Wisconsin and United States Constitutions (Petition for Leave to Commence an Original Action and for Leave to Have Petition Stand as a Complaint Seeking Declaratory Judgment, Para. 55), and to do so could be contrary to the interests of one or another segment of the WRS participants and annuitants. Indeed, Petitioners have stated in their pleadings that they feel they will "prevail" no matter how the Court rules, because their only goal is to obtain a ruling as to what in AB495 is lawful. (Brief in Support of Petition for Preliminary Injunction or, Alternatively, for a Writ of Prohibition, pp. 5-6, n. 1) They come to court as fiduciaries of WRS, not in order to represent the rights and interests of any

In addition to the active and retired law enforcement protective occupation participants in WRS represented by the WPPA, thousands more are represented by other unions or associations, are supervisory employees who may not legally belong to a union or association, or are not represented by a union or association. WPPA's intervention in this action will protect the interests not only of its members but also of all other active or retired law enforcement protective occupation participants in WRS.

particular group of people. A party in such a position cannot adequately represent the personal and valuable interests of WPPA members.

Respondents, on the other hand, also do not adequately represent the interests of WPPA members. They, too, have only institutional interests at stake, and the WPPA cannot expect either institutional interest to present the arguments important to the interests of its members with the same vehemence as the WPPA will present on their behalf. The personal financial interests at stake simply make it so. See Armada Broadcasting, Inc., 183 Wis. 2d at 476.

Finally, the WPPA must agree with WEAC in noting that “there is some question as to whether Respondents and Petitioners have truly adverse interests in this matter.” WEAC’s Memorandum in Support of Motion to Intervene, p. 13. Petitioners’ and Respondents’ initial filings were done on the same day, suggesting some cooperation in preparing for this action. Furthermore, the parties share the same overriding interest in implementing only laws which stand up to Constitutional muster. While these are laudable goals, such goals are those parties’ only goals. They do not have the personal interests which drive our legal system with the zealous representation of one side of an argument, balanced with the zealous representation of the other side. WPPA’s members do have those personal interests and can be relied upon to vigorously present their case to this Court. Finally, because the WPPA is not a state agency like Petitioners and Respondents,

they can maintain this suit without the same standing concerns as are raised by the present parties in light of *Columbia County v. Board of Trustees of the Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962) and *Silver Lake Sanitary District v. DNR*, No. 99-0620 (1999 WL 1125252) (Ct. App. Dec. 9, 1999) (petition for review filed December 20, 1999).

III. IF THIS COURT DOES NOT FIND THAT THE WPPA MAY INTERVENE AS A MATTER OF RIGHT, WPPA REQUESTS PERMISSION TO INTERVENE PURSUANT TO WIS. STAT. §803.09(2).

Barring a right to intervene pursuant to Wis. Stat §803.09(1), the WPPA may still intervene as a party with the permission of this Court under Wis. Stat. §803.09(2), which states:

(2) Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As presented above, WPPA's interests present questions of law in common with the main action before the Court. Furthermore, intervention will not delay the matter, nor prejudice the rights of the original parties. Including the WPPA in the present action would be the most efficient use of judicial resources, and would allow for a full consideration and adjudication of all matters relating to AB495.

IV. CONCLUSION.

Based on the foregoing, Proposed Intervening Petitioners the Wisconsin Professional Police Association, Inc., John Charewicz, David Mahoney, Susan Armagost and Steven Urso, request this Court to grant their Motion to Intervene as of right. In the alternative, the Proposed Intervening Petitioners request this Court to permit them to intervene under Wis. Stat. §803.09(2).

Dated this ____ day of January, 2000.

Respectfully Submitted,

CULLEN, WESTON, PINES & BACH

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